

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 15-1787

Donald W. Mathews,

Appellant,

v.

Robert A. McDonald,

Secretary of Veterans Affairs,

Appellee.

Appellant's Reply Brief

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Argument

I. Identifying Inadequacies in an Examiner's Rationale Is Not Tantamount to Lay Hypothesizing.

Mr. Mathews argued in his principal brief that the Board clearly erred by finding the duty to assist satisfied because VA examiner Dr. Lin's bald recitation of a medical journal article in the October 2014 addendum could not constitute adequate rationale for his negative opinion, particularly given the background of the cited study's participants. Appellant's Brief at 17-19. The Secretary responds that Dr. Lin provided a "reasoned medical explanation connecting [the] facts with the conclusions reached[,]" and, with respect to the cited study, that "there is no evidence that Appellant is competent to provide a medical expert opinion." Appellee's Brief at 10.

Beginning with the latter point, contrary to the Secretary's view, Mr. Mathews plainly did not attempt to interpret the medical findings communicated in the journal article. Rather, he cited authority demonstrating that the participants in the study were not indisputably exposed to Agent Orange ("AO") and explained that given that fact, Dr. Lin could not provide adequate rationale for why **Mr. Mathews's** cancer is not related to AO exposure simply by reciting the study's conclusion. Appellant's Brief at 17-18. This is not lay hypothesizing or incompetent medical analysis.

As for Dr. Lin supposedly providing "a reasoned medical explanation" connecting the facts and data, there just simply is not any there. In the pertinent paragraph, he noted Mr. Mathews's presumed exposure to AO, described the study and recited its conclusion, and then stated that it is less likely than not that Mr. Mathews's tumor was caused by AO

exposure. **Record Before the Agency (“R.”) at 59.** As Mr. Mathews explained in his principal brief, there is no discussion of the study’s scientific basis at all, let alone of why that basis supports his opinion that AO causation is less likely than not. *See* Appellant’s Brief at 18. *See also Monzingo v. Shinseki*, 26 Vet. App. 97, 106 (2012) (demonstrating that the Court must be able to discern the examiner’s medical reasoning from the report for it to be adequate).

Furthermore, the Secretary’s proclamation that Dr. Lin’s January 2014 report and October 2014 addendum “should be read together as a whole[,]” Appellee’s Brief at 9, is unavailing because Dr. Lin’s rationale in the January report is inadequate, as the Board itself correctly found in June 2014, because he relied on melanoma not being on the list of cancers presumptively associated with AO exposure. **R. at 87-88 (85-91), 110 (110-11).** Bootstrapping that flawed reasoning into the October addendum provides no benefit to the Secretary’s argument.

Given that the Secretary does not quarrel with Mr. Mathews’s argument that Dr. Lin’s October 2014 addendum is the only medical opinion in the case that could even potentially satisfy the duty to assist, *see* Appellant’s Brief at 16-17, the foregoing discussion establishes that the Secretary’s argument provides no basis for the Court to hold that the Board did not clearly err by finding that the duty to provide an adequate examination report or medical opinion had been satisfied.

II. The Secretary Has Not Demonstrated Substantial Compliance With the Board's Remand Instructions.

Mr. Mathews argued that the Board clearly erred by finding that there had been substantial compliance with its May 2007 and June 2014 remand instructions, specifically the instructions for review by a panel of three VA oncologists, for Dr. Lin to provide a “detailed” rationale for his opinion, and for Dr. Lin to review the tissue samples and slides of Mr. Mathews’s tumor. Appellant’s Brief at 20-23. As discussed below, the Secretary’s responses are unavailing.

Regarding the Board’s May 2007 instruction that a panel of oncologists provide a consensus etiology opinion, *see R. at 510 (505-15)*, the Secretary recites the Board’s December 2011 finding that the October 2009 opinion by a lone oncologist substantially complied with the instruction for a consensus opinion. Appellee’s Brief at 11 (citing **R. at 249 (245-56)**). Even assuming, *arguendo*, that the Board decision on appeal can properly be construed to have incorporated that finding, the Secretary simply recites it, without attempting to explain why Mr. Mathews’s argument does not undermine that finding. *See id.* As Mr. Mathews explained in his principal brief, the May 2007 Board found that “consensus answers” by a panel of three VA oncologists were necessary to assist Mr. Mathews in substantiating the claim due to, *inter alia*, the “inconclusive opinions regarding the diagnosis, primary cite, and origins of the malignant tumor which was surgically resected in mid-July 2002 from the left posterior neck[.]” **R. at 509 (505-15)**. These medical questions did not become any less complex prior to the preparation of the October 2009 opinion by a single oncologist. Indeed, the record strongly suggests

that the December 2011 Board's acceptance of review by a lone oncologist was motivated by the Appeals Management Center's ("AMC") intransigent refusal to engage a VA oncologist located outside of bureaucratic boundaries, not a new or newly justified belief that a panel review was no longer indicated. *See* Appellant's Brief at 20-21 (citing **R. at 59, 314, 317, 319-23, 360-95**)).

As for the June 2014 instruction that Dr. Lin prepare an addendum opinion based on his review of the tissue samples, **R. at 89 (85-91)**, the Secretary's response is that Dr. Lin "acknowledged the tissue slide sample was *received and reviewed*, in compliance with the Board's order." Appellee's Brief at 12 (citing **R. at 59**) (emphasis added). The Secretary's use of passive voice here betrays the inaccuracy of his argument. The Board did not simply order that anyone receive and review the sample; it specifically instructed that *Dr. Lin* review it. **R. at 87** (noting need for clarification as to whether "the January 2014 oncologist" had access to the slides), **89** (instructing that if the January 2014 examiner did not have access to the slides, they "must be obtained and reviewed *by the oncologist*, and the report *must* indicate this fact.") **(85-91)** (emphasis added). Dr. Lin did not state that he reviewed the slides, but that they were reviewed "by our pathologists" at the Albuquerque VAMC. **R. at 59.**

Finally, as for the June 2014 instruction that Dr. Lin provide a "detailed" rationale for any opinion, to include that he "explain the relevance or significance, as appropriate, of [. . .] medical [. . .] literature [. . .] relied upon in reaching the conclusions[.]" **R. at 90 (85-91)**, the Secretary does not respond to Mr. Mathews's argument that Dr. Lin failed to do either of these things. Appellee's Brief at 11-12. *See also* Appellant's Brief at 22.

Considering the readily apparent problems with the medical literature in question as applied to this case, as discussed above, *see also* Appellant's Brief at 17-19, Mr. Mathews maintains that failure to ensure compliance with this instruction was prejudicial error warranting remand.

Consequently, the Secretary has not identified any legitimate flaw in Mr. Mathews's arguments as to how the Board failed to ensure compliance with its prior remand instructions.

III. The Secretary Does Not Persuasively Defend the Board's Reasons-or-Bases Statement.

Dealing with each in turn, the Secretary's arguments in support of the adequacy of the Board's reasons or bases lack merit.

In response to Mr. Mathews's argument that the Board provided inadequate reasons or bases for its finding that 38 U.S.C. § 5107(b) is inapplicable based on its infirm construction of Dr. Wold's opinions, Appellant's Brief at 24-25, the Secretary states that "the issue is whether [Dr. Wold's] opinion in 2007 contradicted his 2004 opinion[,] and then essentially recites the Board's statements. Appellee's Brief at 13-14. Mr. Mathews agrees that the question here is whether Dr. Wold's 2004 and 2007 opinions are consistent, and he explained in his principal brief why the Board's finding that they are not is too superficial to permit effective review. Appellant's Brief at 24-25. The Secretary does not directly respond, nor does he respond to Mr. Mathews's argument centered on the Board's finding that Dr. Wold's opinion is "challenged" by the December 2013 VA examiner's opinion. *See* Appellee's Brief at 13-14; Appellant's Brief at 25.

As for the Board's reasons or bases for finding that the medical journal article Mr. Mathews submitted in April 2013 lacks probative value, the crux of his argument was that the Board's application of *Mattern v. West*, 12 Vet. App. 222 (1999), is infirm because the Board failed to recognize that the record contains two medical professionals' opinions enabling the article's content to have probative value. *See* Appellant's Brief at 26-27. Referencing one of the two medical opinions—Dr. Khandelwal's November 2003 opinion—the Secretary argues that an inadequacy in the Board's treatment of the journal article would be “harmless error where the Board considered the report in light of the medical opinion of the private medical professional who noted Appellant had only a differential diagnosis [. . .], but determined that opinion was of less probative value because it was contradicted by every other medical opinion of record.” Appellee's Brief at 15.

Contrary to the Secretary's insinuation, however, the Board did not address any medical opinion in conjunction with its application of *Mattern*, much less present the reasoning the Secretary proffers. **R. at 21-22 (2-29)**. It simply stated that the journal article has no probative weight because it “cannot speak to whether the Veteran himself has epitheloid [sic] sarcoma[.]” **R. at 21 (2-29)**. Thus, the Secretary's arguments should be rejected as impermissible *post hoc* rationalizations. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (“‘courts may not accept appellate counsel's post hoc rationalization for agency action.’”) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011) (“[. . .] it is the Board that is required to provide a complete statement of reasons or bases, and the

Secretary cannot make up for its failure to do so.”); *Smith v. Nicholson*, 19 Vet. App. 63, 73 (2005) (“it is not the task of the Secretary to rewrite the Board’s decision through his pleadings filed in this Court.”).

Even if his *post hoc* assertion warrants consideration, it lacks merit because it is grounded on circular reasoning. *Mattern* stands for the principle that medical treatise evidence can provide “**important support** when combined with an opinion of a medical professional.” *Mattern*, 12 Vet. App. at 228 (emphasis added). The Secretary argues that the Board’s minimizing of Dr. Khandelwal’s opinion renders the Board’s improper application of *Mattern* harmless, but had its application been proper the journal article could have provided important support to Dr. Khandelwal’s opinion that may have buttressed its probative value in the Board’s eyes. *See Mattern, supra*. Thus, the Board’s reasons for rejecting Dr. Khandelwal’s opinion, if anything, confirm the prejudice in the Board’s dismissal of the journal article.

Turning to the Board’s remand instructions, Mr. Mathews presented an alternative argument that the Board’s substantial compliance finding is not supported by adequate reasons or bases. Appellant’s Brief at 27-28. Regarding the Board’s May 2007 instruction for review by a panel of three VA oncologists, the Secretary cites the Board’s substantial compliance finding in its December 2011 decision and avers that “[t]here was no reason for the Board to again explain why it determined there was substantial compliance when its previous decision did so.” Appellee’s Brief at 16 (citing **R. at 249 (245-56)**). Again, the Board’s March 2015 decision is before the Court, not its December 2011 one. Even if there is some basis to find that the March 2015 decision incorporates

the December 2011 reasoning by reference, the Secretary's argument nevertheless lacks merit because the December 2011 reasoning is inadequate. As discussed above and in Mr. Mathews's principal brief, the record strongly suggests that the lone reason the Board retreated from its May 2007 determination that review by multiple oncologists was indicated was the AMC's unwillingness to place its obligation to Mr. Mathews ahead of fealty to lines VHA drew on a map. *See* Appellant's Brief at 20-21. Nothing in the December 2011 language permits effective judicial review of that question, or of why the Board did not simply again seek review by a panel of three oncologists in that decision when it determined that remand was necessary due to the inadequacy of the October 2009 oncologist's opinion. *See R. at 250 (245-56)* (“[. . .] as the October 2009 report is not adequate, the case must be remanded and forwarded to the October 2009 oncologist for an addendum opinion [. . .].”).

As for the June 2014 instructions, the only argument the Secretary appears to present is to note that after May 2007 “the Board remanded the claim three times for additional development[,]” and “[p]ursuant to each remand, additional medical opinions were obtained, substantially complying with the remand to provide adequate [sic] medical opinion.” Appellee's Brief at 16. Mr. Mathews cannot ascertain how these terse statements reflect that the Board's substantial-compliance reasons or bases are adequate notwithstanding its failure to account for Dr. Lin's stated failure to review the tissue samples and failure to explain his reliance on the medical study findings.

Mr. Mathews also presented an alternative reasons-or-bases argument with respect to the Board's finding that the duty to assist was satisfied by providing an adequate

medical opinion. Appellant's Brief at 28-29. The Secretary responds that medical examiners have no reasons-or-bases requirement and that examination reports should be read as a whole. Appellee's Brief at 16. While germane to the Court's review of an examination report, these principles do not relieve the Board of its obligation to provide adequate reasons or bases for finding the duty to assist satisfied to permit effective judicial review. *See Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014) ("The Board must support its determination that VA satisfied its duty to assist with an adequate statement of reasons or bases."); *Daves v. Nicholson*, 21 Vet. App. 46, 51 (2007) (holding that the Board's reasons or bases concerning the duty to assist did not permit the Court to conduct proper review). The Secretary's assertions, to the extent they are even responsive, are *post hoc* rationalizations that do not undermine Mr. Mathews's arguments as to the inadequacy of the Board's reasons or bases here.

Consequently, the Secretary's arguments provide no basis for the Court to reject Mr. Mathews's arguments as to the inadequacy of the Board's reasons or bases.

Conclusion

For the reasons articulated in his principal brief and herein, Mr. Mathews respectfully requests that the Court vacate the Board's decision and remand for readjudication.

Respectfully submitted,

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